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Supreme Court, U.S.
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No. 85-1461

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES AIKEN, WARDEN, CENTRAL CORRECTIONAL INSTITUTION, AND TRAVIS MEDLOCK, ATTORNEY GENERAL, STATE OF SOUTH CAROLINA,

Petitioner,

versus

WILLIAM GIBBS HYMAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether under the unique facts of this case, certiorari must be granted to review the Fourth Circuit's decision granting Respondent a new sentencing hearing, in light of Cabana v. Bullock, even though: (i) the jury was erroneously instructed by the court in violation of Enmund v. Florida in response to a mid-deliberation inquiry at the penalty phase of Respondent's trial; (ii) South Carolina law requires that the jury alone make the sentencing determination; and, (iii) the state court record is inadequate to serve as the basis for a reliable post trial Enmund determination due to the grossly incompetent representation afforded Respondent at his trial.

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The Respondent, William Gibbs Hyman, responds to the Attorney General of South Carolina's Petition for A Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. Respondent maintains that the Court of Appeals correctly ordered that he be given a new sentencing hearing and, therefore, certiorari is not warranted to review the Fourth Circuit's decision to vacate of the death sentence on the basis of Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), in light of this Court's recent decision in Cabana v. Bullock, ___ U.S. ____, 88 L.Ed.2d 704 (1986).

STATEMENT OF THE CASE

In March of 1979, Hyman, Robert Hinson, Sue Allday, Iris Midgett, Respondent and his wife, Doris Hyman, concocted a drunken scheme to "flim-flam" two older brothers. The scheme was conceived during an evening of heavy drinking, and perhaps drug ingestion. One of the group, Iris Midget, had "flim-flammed" these same men once before. Mr. Hyman was too intoxicated to drive but the group traveled in his car.

Upon arrival at the men's trailer, Mrs. Hyman and Sue Allday went to the door. The brothers were intoxicated and watching television. However, they would not allow

the women to come into their house. The group shortly returned to the trailer. At that time, the door flew open and one of the brothers shot and wounded Mr. Hinson. Sue Allday admitted that she then fired a shotgun into the trailer. As all reviewing courts have found, a general melee then ensued. One of the brothers was struck on the head, and the other, Teagus Griffis, was shot in the chest and died. Mr. Hyman and his co-defendants were arrested and charged with murder and armed robbery.

Three co-defendants pled guilty: Mr. Hinson and Ms. Allday to murder (they each received mandatory life sentences); and Ms. Midgett to the charge of accessory to armed robbery (she received an eighteen year sentence). Mr. Hyman refused to plead guilty. Therefore, the state notified Mr. Hyman that it intended to seek the death penalty. Hyman's trial commenced on October 8, 1979. Defense counsel's strategy, to the extent there was a defense strategy, consisted of putting the State to its burden of proof. There was evidence that all parties, including the Respondent and the victims were extremely intoxicated. Defense counsel suggested, during the cross-examination of the victim's brother, that the shooting may have been an accident. However, no attempt was made to develop this into a coherent theory. Counsel's request for a manslaughter instruction was denied. Hyman was found guilty of murder on October 12, 1979.

The evidence presented by the defense at the penalty phase consisted of a minister and several family members. Hyman also took the stand and denied killing anyone. Like the argument given by defense counsel at the guilt phase, the arguments at the penalty phase were incoherent and ineffective. After several hours of deliberation, the jury asked: "[d]o we have to prove that he did the actual killing [in order to impose the death penalty?]". The judge instructed the jury that a person who is present as an accomplice is as culpable as the person who pulls the trigger. Within an hour, the jury returned with a sentence of death.

In order to properly understand and place in context the circumstances surrounding Mr. Hyman's trial and sentence of death, as well as to understand why the trial record is inadequate to serve as the basis for a reviewing court to make an Enmund determination, a more detailed examination of the ability of counsel and the events of the trial is necessary.

When Mr. Stratos, Hyman's retained counsel, first saw the Respondent, he did not keep office hours and he practiced "semi-actively" out of his home. He did not have

the current South Carolina Code, which contained the death penalty statute. Additionally, he did not have copies of any reporters or subscribe to any advance sheets.

Respondent moved before trial to relieve Mr. Stratos as his lawyer,[1] because, as he told the trial judge, he did not believe that Stratos was sufficiently "up on the law."[2] The judge did not relieve him but instead appointed Mr. Landon Louthian as co-counsel. Louthian testified at the Post-Conviction Relief Hearing that he did no research or investigation because Stratos was in charge of the case. There is no question, and it is not disputed, that Stratos was chief counsel and Louthian's role was a limited one.

Even after Mr. Stratos received formal notice that the Solicitor intended to seek the death penalty and even after Hyman told him that he would not plead guilty, he still did no pre-trial preparation. Hyman rejected the State's offer of a life sentence in exchange for a guilty plea to murder. However, he did so without counsel ever explaining the law of accomplice liability to him. As Respondent himself testified at the Post-Conviction Relief hearing:

> Q. Did Mr. Stratos ever explain to you the law of criminal agency, concert, criminal concert of action, the law of conspiracy?
>
> A. No sir. Mr. Stratos didn't explain those things.
>
> Q. Has that ever been explained to you?
>
> A. You have - you and Miss Stirling both have talked to me.

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(1) Arthur G. Howe, a former Assistant United States Attorney, a former Circuit Solicitor for the Ninth Judicial Circuit, and a highly competent and experienced trial attorney, was asked, based upon his observation of Mr. Stratos through the years, whether he had an opinion as to whether or not Mr. Stratos was generally competent to try any serious criminal case. Judge Morris sustained objection to this testimony, but Mr. Howe testified, as an offer of proof, that Mr. Stratos was not qualified to try most serious criminal cases.

deRosset Myers, an emminent member of the Charleston County Bar, a former president of the South Carolina Bar Association, a lawyer who has been extremely active in bar and legal matters for over thirty years, and who has been appointed by the South Carolina Supreme Court as a special General Sessions Judge, likewise offered the opinion, received only as an offer of proof, that based on his observation of Mr. Stratos, he was not competent to render effective assistance of counsel in any major criminal case.

G. Dan Bowling, a younger member of the Charleston Bar, a former law school professor, a former Public Defender for Charleston County, and an active practitioner in the criminal courts of South Carolina, likewise testified as an offer of proof that Mr. Stratos was not competent to try any serious criminal case.

(2) Stratos testified "I did not go to see him for approximately two months after he got up and made the statement that he didn't want my services any more, that I didn't know anything, so I wasn't interested in talking to him."

The principal evidence against Hyman was that of his testifying co-defendants, Hinson, Midget and Allday, and the surviving victim, Collins Griffis. However, counsel never talked substantively with these witnesses or made any effort to do so.

The Circuit Solicitor had an open file policy, both prior to, as well as during trial. All counsel obtained from the Circuit Solicitor's file was the statements of the co-defendants.

Stratos testified:

> A. At the time I got the file, I looked through it, but I don't at the time recall-I saw a statement the other day that was made by Hyman. It's a possibility that I even looked at it, but I looked through it this morning, and I'm almost positive that if I looked at it, I looked through the first or second pages and saw that he was telling untruths, so I didn't go on through with it. I don't see any-I'm sorry."

There was a statement in the file by a friend of Mr. Hyman, a Mr. Lindgren, which in part stated that Hyman told him: "[a]fter Bob [Hinson] got shot, Sue shot the man." Louthian stated that he did not see that statement but realized that it would have been useful in the event Hyman were to take the stand and claim Sue Allday did the shooting as a prior consistent statement to rebut an inference of a recent fabrication. Similarly, a letter from the Charleston County Police Department to the director of the FBI contained the following statement:

> Subject Teagus Griffis opened door at which time he was shot and killed by a shotgun blast. Subject Collins Griffis and suspects fought causing severe injuries to Collins Griffis head.

Mr. Louthian did not see this document, but again thought it would have been of some use. Furthermore, a police incident report was read to Mr. Louthian.

> That he and his brother were watching T.V., and it was just when Hee Haw Honeys was going off, when a woman came to the trailer and wanted some help. She had a flat tire. He told his brother not to open it up, "because some gangsters are around here." He stated that he tried to get his brother not to open the door, but his brother did it anyway. As soon as his brother did, there was a blast, and his brother stiffened out and fell backward on the floor. Then the next thing he knew, there was a flash and something hit his face. He layed there until they left, and "then I went to Mr. Brown's house for help."
> By further talking with the subject, he also stated that one of the women grabbed his brother's shotgun that was by the door, and she shot his brother with his own shotgun.
> A. Yes, Sir.
> Q. The solicitor did not make Plaintiff's Exhibit No. 8-or didn't give Plaintiff's Exhibit No. 8 to you, or did he?
> A. I don't recall ever seeing it prior to this; no sir.
> Q. That would have been of some use, if you would have had it at the trial of Mr. Hyman?
> A. I think it would, because it was Mr. Hyman's contention all along that he didn't shoot him, that he thought Sue Allday had done it."

This was, obviously, very important because the above material states that the surviving victim told the police that it was a woman who shot and killed his brother. As the above evidence makes clear, the real issue in this case was who was the triggerman. This strategy would, of course, maintain that Sue Allday fired the fatal shot. Mr. Hyman's case would thus depend upon both his testimony, and that of his wife, to contradict Miss Allday. At her trial, Mrs. Hyman testified that Sue Allday admitted to her that she had fired the fatal shot. However, Mrs. Hyman was not a witness at Mr. Hyman's trial. Counsel never sought her testimony.

Hyman was sent to the South Carolina State Hospital for a mental examination, but counsel did not talk to any of the doctors at the State Hospital, did not get a copy of the State Hospital records, and did not give any consideration to independent psychiatric or psychological witnesses. For the Post-Conviction Relief hearing, Dr. Ada Kirkman, a psychiatrist, examined Mr. Hyman, and testified that at the time of the offense Hyman's capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law, was substantially impaired. Additionally, she testified that in her opinion, Respondent was under the influence of a mental or emotional disturbance at the time of the crime. These are statutory mitigating circumstances pursuant to the South Carolina death penalty statute. See S.C. Code Ann. §16-3-20(c)(b)(2) and (c)(b)(6).

Counsel had not read the South Carolina Death Penalty Statute , S.C. Code Ann. §16-3-20 et seq. (Law.Co-Op. 1985), prior to the trial, and first read it in the period between the guilt and penalty phases. Further, they did no legal research generally, and did not read any South Carolina or United States Supreme Court decisions concerning the death penalty. Additionally, they did not discuss the problems incident to a death penalty case with any other attorneys. They were not familiar with the principles, of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and therefore, failed to participate appropriately in voir dire. The composition of the jury reflected their

unfamiliarity with Witherspoon.[3] Neither were they familiar with the case or the principles of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 793 (1978).

REASONS THE WRIT SHOULD NOT BE GRANTED

I. THE WRIT NEED NOT BE GRANTED UNDER THE UNIQUE FACTS OF THIS CASE TO REVIEW THE COURT OF APPEALS DECISION IN LIGHT OF CABANA V. BULLOCK BECAUSE: THE JURY WAS ERRONEOUSLY INSTRUCTED BY THE TRIAL COURT IN VIOLATION OF ENMUND V. FLORIDA IN RESPONSE TO A MID-DELIBERATION INQUIRY AT THE PENALTY PHASE; SOUTH CAROLINA LAW REQUIRES THAT THE JURY ALONE MAKE THE SENTENCING DETERMINATION; AND, THE TRIAL RECORD IS INADEQUATE TO SERVE AS THE BASIS FOR A RELIABLE POST TRIAL ENMUND DETERMINATION DUE TO THE GROSSLY INCOMPETENT REPRESENTATION AFFORDED RESPONDENT AT HIS TRIAL.

There are at least three reasons certiorari is not warranted to review the Fourth Circuit's decision that Mr. Hyman is entitled to a new sentencing hearing under the unique facts of this case. First, the trial court's instruction, in response to a mid-deliberation inquiry at the penalty phase of Hyman's trial, permitted the death penalty to be imposed in violation of Enmund. Second, South Carolina law requires that the Enmund determination be made by the jury alone. Finally, the trial record in this case cannot support an adverse determination on the Enmund issue, sufficient to satisfy the Eighth Amendment's demand for reliability, due to the gross incompetence of counsel at Hyman's trial.

A. This Court's holding in Cabana and the holding of the Fourth Circuit in Hyman

In Cabana v. Bullock, ___ U.S. ___, 88 L.Ed. 2d 704 (1986), this Court held that "the Eighth Amendment does not require that a jury make the findings required by

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(3) At trial, juror Manigault Jenkins was excused for opposition to the death penalty, the attorneys for the defendant asking no questions. At the hearing for Post-Conviction Relief, this juror was tendered as a witness. The judge refused to allow the introduction of his testimony. Respondent presented an offer of proof that if Mr. Jenkins were allowed to testify, he would state that if he had been asked, he would have stated that his opposition to capital punishment was not unequivocal, and that he would have been able to consider, and perhaps could have voted to impose the death penalty.

Enmund," i.e., that the death penalty cannot be imposed on one who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force be employed. 88 L.Ed. 2d at 720. The concerns of the Eighth Amendment are met as long as the requisite Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), findings are made in "an adequate proceeding before some appropriate tribunal." Cabana, supra, 88 L.Ed.2d at 720.

In this case, the Fourth Circuit held that a judge's charge in response to the following request by the jury during the penalty phase of Hyman's trial: "[d]o we have to prove that he did the actual killing?" -failed to satisfy the constitutional concerns expressed by this Court in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Enmund v. Florida, supra. Hyman v. Aiken, 777 F.2d 938, 940 (4th Cir. 1985). The trial judge's supplementary instruction, in pertinent part, was as follows:

> I can't get into a discussion with you on the facts of the case....You may return a death sentence if there is a mitigating circumstance present if you find at least one aggravating circumstance is present....
>
> I charged you earlier that a person who aids and assists another in the commission of the offense or who was present at the time and committed the offense, would be equally guilty because under the hand of one, the hand of all theory, a person who commits the offense in concert with other is guilty obviously and anyone who assists the person committing an offense is guilty. But you've passed the question of guilt or innocence. It would be proper for you to consider in matters of mitigation or aggravation obviously whether this Defendant used the weapon or whether he didn't; but I'm not going to get into the facts with you now and try to reach any decision or suggest any opinion I may have as to what your position should be so far as a recommendation of sentence because under our Constitution, I can't comment on the facts....

Less than an hour after being "reinstructed", the jury returned with a verdict of death.

The panel of the Fourth Circuit, which heard the appeal from the denial of habeas corpus relief in this case, concluded:

> The Court's supplementary instruction in response to the foreman's question is inconsistent with Enmund v. Florida. Having found that murder was committed during an armed robbery, the jury could reasonably conclude that the instruction authorized it to recommend the death sentence even if it found as a mitigating circumstance that Hyman was not personally responsible for the murder. The instruction allowed the jury to recommend a death sentence for Hyman as an aider and abettor whether or not he killed, attempted to kill, or intended to kill the robbery victim. Consequently, the sentence of death imposed on recommendation of an erroneously instructed jury cannot be carried out, and Hyman must be resentenced. 777 F.2d at 940.

The Petitioner, the Attorney General of South Carolina, has argued that certiorari is warranted to resolve the conflict between this Court's decision in Cabana, supra, and the Fourth Circuit panel opinion in Hyman, supra. In doing so, the petitioner described the panel opinion as holding: "an individual could be sentenced to death only if a jury made a finding in the punishment stage of a bifurcated trial that the person killed, attempted to kill, or intended to kill." Petition for Cert. at 18. The Petitioner's paraphase of the Fourth Circuit opinion is incorrect. A fair and proper reading of the panel opinion demonstrates no conflict between Cabana and Hyman.

B. The Significance of the Jury's Request for Guidance at the Penalty Phase of Hyman's Trial

The uniqueness of the factual situation involved in this case discredits Petitioner's argument. The jury, sua sponte asked the trial court for guidance as to the degree of culpability necessary in order to impose the death penalty. Thus this is not a case in which a defendant asked for an Enmund instruction and the request was denied or even a case in which no request of any type was made. Although, under Cabana, a defendant may not be constitutionally entitled to have the jury make the Enmund determination, and have the jury so instructed, it would certainly seem that if a jury requests guidance on the issue, a defendant is constitutionally entitled to an accurate description of the law. See Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985); California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).(4) To reach any other conclusion would allow a "level of uncertainty and unreliability in the fact finding process...[that] cannot be tolerated in a capital case." Beck v. Alabama, 447 U.S. 625, 643, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

The panel correctly determined that the "reinstruction" given in this case indicated to the jury that it was permissible to sentence Hyman to death even if he were no more than an aider and abettor with no intent to kill or knowledge that a killing would take place. Clearly a death penalty, with that factual basis, contravenes Enmund. Due to

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(4) In Caldwell, supra, this Court found that one of the main flaws with the prosecutor's closing argument at the penalty phase of Caldwell's trial was that it was not an inaccurate statement of the law. 105 S.Ct. at 2643. Conversely in Ramos, supra, the majority, in upholding the constitutionality of the "Briggs" instruction, relied upon the fact that the instruction was an accurate statement of the law. 463 U.S. at 1010.

the fact that the jury requested guidance and received an inappropriate instruction the Petitioner's characterization of the panel opinion's holding is misguided. It cannot be said that the erroneous instruction had "no effect on the sentencing decision" and thus "that decision does not meet the standard of reliability that the Eighth Amendment requires." Caldwell, supra, 105 S.Ct. at 2646. In context, the decision is a narrow one based upon unique facts. Certiorari is not warranted; Cabana does not and should not affect the outcome in this case.

C. South Carolina Law Requires that the Sentencing Jury Make the Enmund Determination

The Attorney General of South Carolina neglected to mention, in its Petition for a Writ of Certiorari, that the South Carolina Supreme Court, in State v. Peterson and Stubbs, ___S.C.___, 335 S.E.2d 800 (1985)[5] determined, as a matter of South Carolina criminal procedure, that:

> "[d]uring the penalty phase of death penalty cases which involve conspiracy liability, the trial judge should charge that the death penalty can not be imposed on an individual who aids and abets in a crime in the course of which a murder is committed by others, but who did not himself kill, attempt to kill, or intend that a killing take place or that if lethal force be used."

The Fourth Circuit panel relied upon this case in reaching its decision. Hyman, supra, 777 F.2d at 940 n. 1. The South Carolina Supreme Court's decision was issued while this case was pending in the Fourth Circuit.

In Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980), this Court held that where state law creates a liberty interest in having the jury make particular findings, the Due Process Clause does not permit appellate findings to protect that entitlement. Hicks, supra, 447 U.S. at 347; See also Cabana, supra, 88 L.Ed.2d at 717, n.4. This Court stated:

> [w]here, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law.

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(5) It should be noted that in Peterson, supra, the court discussed three separate issues, a conspiracy charge, a malice charge and the Enmund issue. The Court found that Appellants were entitled to a new trial due to the fact that the conspiracy charge allowed the jury to find one of the appellants guilty of murder on the basis of a conspiracy to commit the larceny of a motor vehicle. The court then found a Sandstrom error and finally held that in conspiracy cases a defendant was entitled to an instruction that forces the jury to make the Enmund determination.

> The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury. . . .[citations omitted] Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law. Hicks, supra, 447 U.S. at 346.

State v. Peterson, supra, makes clear that there is a state law entitlement to have the jury make the Enmund determination. In Peterson, the South Carolina Supreme Court construed the existing South Carolina Death Penalty Statute, S.C. Code Ann. §16-3-20 et. seq., which has not been amended during any period relevant to this case, to require that the jury be given an Enmund type instruction. Thus, pursuant to Hicks, Hyman is constitutionally entitled to have the life/death decision made by a properly and adequately instructed jury. To not give effect to Peterson's creation of a state law entitlement to have the jury make the Enmund determination would do no more than permit the State of South Carolina to perform "one last cruel and unusual punishment. See Jones v. Thigpen, 741 F.2d 805, 807 (5th Cir. 1984).(6) Therefore, for the additional reason that pursuant to South Carolina law, the jury is required to make the Enmund determination, the Fourth Circuit's decision was correct and certiorari is not warranted.

D. The Trial Record is Inadequate for an **Enmund** Determination Due to Counsel's Incompetence

Respondent's opposition to the Petition for a Writ is not based simply upon Respondent's contrary reading of Cabana v. Bullock or the context of South Carolina law. Rather, Respondent maintains that the trial record cannot support an adverse determination on the Enmund issue. Cabana did not weaken this Court's demand that any sentence of death comply with the Eighth Amendment's concern for reliability. Accurate findings in an adequate proceeding are constitutionally mandated. Cabana, supra, 88 L.Ed.2d at 720. Obviously, a prerequisite to any "adequate" finding is that the record be

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(6) It should be noted that applying Peterson would have little adverse effect on South Carolina's administration of its system of criminal justice. Only a few cases, at most, would be touched by the ruling. See generally Enmund v. Florida, supra, 458 U.S. at 791-97 (this Court acknowledged its holding "touched only a handful of death row inmates"). To deny Appellant relief merely because Hyman's trial preceeded the decision in Peterson and Stubbs, would be unprincipled and unjust. One would die, while others similarly situated live, for no other reason than the timing and vagaries of appellate litigation. It is difficult to imagine a basis for a sentence of death less compatible with the fundamental commandment of the Eighth Amendment that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice." Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 2d 393 (1977).

sufficient to support any findings drawn from it. In rejecting Hyman's claim, both the State Post-Conviction judge and the South Carolina Supreme Court relied solely upon the trial record. However, due to trial counsel's gross incompetence, the trial record is inadequate to support an adverse determination on that issue. Furthermore, other instructions given at Hyman's trial further skewed the culpability decision.

1. The Effect of Trial Counsel's Performance

First, it is not disputed that the representation Hyman received was far from ideal. The federal magistrate to whom the case was referred found that Hyman was denied the effective assistance of counsel. The Court of Appeals, although finding counsel were not constitutionally ineffective as to the guilt phase, did not reach the question of ineffective assistance at the penalty phase. The panel noted, however, that the "most serious charges [of ineffectiveness] against trial counsel involved the defeciencies" at the sentencing phase. Hyman, supra, 777 F.2d at 941. The incompetence of counsel skewed the culpability decision required by Enmund adversely to Hyman.

As the statement of facts points out, defense counsel were not familiar with Witherspoon, Lockett, or any other death penalty decisions of this or any court. They did not even read the death penalty statute until after Hyman was convicted of murder. Substantial evidence in the state's file, made available to defense counsel, indicating that Hyman was not the triggerman, went undiscovered. Additionally, although Hyman at all times maintained that Sue Allday shot the victim, counsel barely pursued this theory at trial. Hyman's wife, who corroborated his story, was not even called. Additionally, witnesses in mitigation were not called and those that testified were not previously prepared nor was the nature of the penalty phase proceeding explained to them.

Therefore, pursuant to the requirements of Cabana, based upon the evidence at Hyman's trial, a reviewing court cannot adequately say, sufficient to meet the Eighth Amendment's concern and demand for reliability, that Hyman killed, attempted to kill, or knew that a killing would take place. The defense theory, to the extent that there was a

defense theory[7], raised the possibility that the victim was accidently shot by his brother, or by another defendant, during a struggle for a weapon. There was no testimony at trial as to who actually fired the shot that killed Teagus Griffis except for that of Hyman's accomplices who testified in exchange for a favorable plea bargain. Moreover, even accepting the accomplices' versions of events, no one saw Hyman shoot the victim.[8] At the penalty phase, Hyman testified and specifically denied that he killed anyone. The foreman's request, after three hours of deliberation at the penalty phase, indicates that the jury, at the very least, took his testimony and version of events seriously. The instruction given by the judge, in response to the jury's inquiry, only complicated the problem and allowed a sentence of death to be imposed in contravention of Enmund. Therefore, due to counsel's inadequacies, the trial record cannot support the State Post-Conviction Court's adverse determination on the Enmund question. Thus there is no conflict between the Fourth Circuit's decision in Hyman and this Court's ruling in Cabana, and certiorari is not warranted to review the panel's determination that Hyman is entitled to a new sentencing hearing.

2. The Effect of other Jury Instructions

By Cross-Petition, Respondent has petitioned for a writ of certiorari to review the Fourth Circuit's determination denial of his claim that the malice instruction given at Hyman's trial did not warrant a new trial. The Cross-Petition sets out in greater detail

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(7) There was, in essence, no defense theory, and certainly no coherent defense theory, at either the guilt phase or the penalty phase. What "theory" there was amounted to suggesting the possibility that the victim was killed by another co-defendant or accidently by his own brother, and putting the State to its burden of proof. The panel, although apparently finding that counsel's performance was deficient, found no prejudice at the guilt phase. Because habeas corpus relief was granted as to the penalty phase, the panel reserved ruling on ineffective assistance of counsel at the at the penalty phase. Obviously, counsel's total inadequacy makes the record very undeveloped on the Enmund claim. Still there is enough confusion in the record to refute the Petitioner's contentions.

(8) This theory was pursued by the defense during cross-examination and closing arguments at the guilt phase. There was also testimony establishing that all parties, including the defendant, were extremely intoxicated. The jury was given an instruction regarding accomplice liability a charge that they could consider Hyman's intoxication on the issue of malice and intent, and an erroneous burden shifting charge on malice. Thus not only could the jury have found Hyman guilty on an imputed accomplice liability theory, the jury could have presumed malice from Hyman's doing of an unlawful act, i.e., being involved in the robbery. A case similar to Hyman's i.e., involving an Enmund as well as a Sandstrom problem, is Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982). The Court in Clark, recognized how a faulty charge on the issue of intent could skew the fact finding process, thus, resulting in a sentence of death.

Respondent's claim and Respondent would refer this Court to that pleading. Respondent would note at this point that the malice instruction is an additional reason the Attorney General of South Carolina's Petition for a writ of certiorari should be denied.

First, the malice instruction given at Hyman's trial, as the Fourth Circuit realized, is indistinguishable from the one given in Yates v. Aiken.[9] This Court summarily reversed the South Carolina Supreme Court in Yates and remanded for reconsideration in light of Francis v. Franklin, 472 U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). (holding that the malice instruction violated the principles of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)). Yates v. Aiken, ___ U.S. ___, 88 L.Ed. 2d 218 (1985). Thus, it seems clear that the malice instruction is in conflict with Francis v. Franklin, 472 U.S. _____, 105 S.Ct. 1905, 85 L.Ed. 2d 344 (1985). The Fourth Circuit assumed that was the case. Hyman, supra, 777 F.2d at 941.

Under the peculiar facts of this case, the following scenario is highly likely. Hyman was found guilty of murder based upon implied malice and/or accomplice liability, which was also charged. The two instructions, either independently or in tandem, resulted in a finding of malice. Then at the penalty phase the finding of malice was bootstrapped into a sentence of death. This is not just speculation but is probable, especially due to the jury's request for guidance, after extended deliberations, at the penalty phase of Hyman's trial. Less than an hour after being "reinstructed", the jury returned with a sentence of death. The judge's charge only exacerbated the problem. Due to the combined effect of the errors a new sentencing hearing is the only way this or any court can determine if the death penalty is appropriate in this case.

CONCLUSION

The Respondent, William Gibbs Hyman, submits that for all the reasons stated above, the Fourth Circuit correctly decided that he was entitled to a new

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(9) The South Carolina Supreme Court has held that virtually identical instructions are impermissible burden shifting instructions. State v. Elmore, 279 S.C. 781, 308 S.E.2d 781 (1983); State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984).

sentencing proceeding in conformity with the requirements of the Eighth and Fourteenth Amendments. Therefore, Respondent requests that certiorari be denied.

Respectfully submitted,

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April 1, 1986.

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CERTIFICATE OF SERVICE

I do certify that I have this date served Respondent's Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit on the Petitioner by depositing a copy of the same in the United States Mail, first-class postage prepaid, and addressed as follows:

Donald J. Zelenka
Chief Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

This 1st day of April, 1986.

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